United Cerebral Palsy Association of Niagara County, Inc. and Yvonne Page, an Individual Petitioner, and AFL-CIO Hospital & Nursing Home Council. Case 3-UD-184

October 30, 1998

## **DECISION AND DIRECTION**

## BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections to and determinative challenges in a deauthorization election held February 5 and 6, 1998, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows that of approximately 141 eligible voters, 111 cast ballots, of which 68 were cast in favor of the proposition to withdraw the authority of the Union, under its agreement with the Employer, to require that employees make certain payments to the Union in order to retain their jobs; 38 ballots were cast against this proposition; and 5 ballots were challenged, a sufficient number to affect the results of the election. 1

The Board has reviewed the record in light of the exceptions and brief and adopts the Regional Director's findings<sup>2</sup> and recommendations.

We adopt the Regional Director's findings and analysis of Objection 3 that a new election is required under Kalin Construction Co., 321 NLRB 649 (1996). Under the rule established in Kalin, if a valid objection is filed, an election will be set aside where the employer changes the "paycheck process" during the period beginning 24 hours before the scheduled opening of the polls, absent a showing that "the change was motivated by a legitimate business reason unrelated to the election." Here, the Employer made three changes to the "paycheck process," as defined in Kalin. Thus, on the first day of polling, the Employer: (1) accelerated the time at which checks were made available to employees; (2) changed the distribution site from individual workplaces to the polling locations; and (3) changed the individuals who distributed checks. Further, the Employer offered no business justification unrelated to the election to justify the changes. On the contrary, the Employer's proffered reason for the change—employee convenience—relates directly to the election. Finally, as found by the Regional Director, the changes were particularly significant because of their foreseeable effect of enhancing voter turnout, a critical fact in deauthorization elections where a majority of eligible voters must vote for deauthorization in order for that proposition to prevail.<sup>3</sup>

By stressing the foreseeable effect of the Employer's changes on voter turnout, we so not suggest that we disagree with our dissenting colleague's assertion that maximum voter participation in Board-sponsored elections is a laudable goal. However, the Board must protect employee free choice in all voting decisions. As the Board held in *Kalin*, employees' paychecks are a singularly powerful symbol of their economic dependence on the employer, so any changes in how those paychecks are distributed, especially if they occur just before the election, are likely to have a particularly strong influence on employee sentiments. Id. at 652. Thus, the Employer interferes with employee free choice by making any changes in this process that are related to any facet of the election, including voter turnout.

## DIRECTION

IT IS DIRECTED that the Regional Director for Region 3, shall, within 14 days of this Decision and Direction, open and count the ballots of Yvonne Page, Meghan Wielgus, and Dennis Lynk and thereafter prepare and cause to be served on the parties a revised tally of ballots. In the event that the revised tally of ballots shows that a majority of the eligible voters have not voted to deauthorize the Union, and that the challenged ballot of Thomas C. Weston Sr. would not be determinative, the Regional Director shall issue a certification of results.

IT IS FURTHER DIRECTED that, in the event that the challenged ballot of Thomas C. Weston Sr., should be determinative on the issue of deauthorization, the Regional Director shall hold the disposition of this challenged ballot in abeyance pending the outcome of the unfair labor practice proceeding involving Weston.

Finally, in the event that the revised tally of ballots (following disposition of the challenge to Weston's ballot) reflects that a majority of eligible employees have voted to deauthorize the Union, IT IS DIRECTED that the February 5 and 6, 1998 election shall be set aside and that the Regional Director shall conduct a new election in conformance with the following Direction.

[Direction of Second Election omitted from publication.]

## MEMBER HURTGEN, dissenting in part.

My colleagues conclude that if, after tabulation of the challenged ballots, a majority of the unit employees have voted to deauthorize the Union, the election should be set aside based on Objection 3. I disagree. Instead, in the event the revised tally shows that a majority of eligible

<sup>&</sup>lt;sup>1</sup> In a deauthorization election a majority of the eligible voters must vote in favor of deauthorization in order for it to prevail.

<sup>&</sup>lt;sup>2</sup> There were no exceptions to the Regional Director's recommendation to overrule the challenge to the ballots of Yvonne Page, Meghan Wielgus, and Dennis Lynk and to sustain the challenge to the ballot of Zelice Caldwell. There was also no exception to the Regional Director's recommendation that the challenge to the ballot of Thomas C. Weston, Sr., be held in abeyance pending resolution of a pending grievance over his discharge and the charge in Case 3–CA–21159.

The Union withdrew its Objection 1, and no exceptions were filed to the Regional Director's recommendation to overrule its Objections 2, 5, 7, and 8

<sup>&</sup>lt;sup>3</sup> In light of this finding, we find it unnecessary to pass on the Regional Director's alternative recommendation that a hearing be conducted on the Union's Objections 4 and 6.

employees voted for deauthorization, I would overrule Union Objection 3 and remand this case for a hearing on its Objections 4 and 6.<sup>1</sup>

In Objection 3, the Union alleged that the Employer interfered with the election by making changes to the "paycheck process" during the election as proscribed in *Kalin Construction Co.*, 321 NLRB 621 (1996). The Regional Director recommended, and my colleagues find, that under *Kalin*'s per se test, the election must be set aside based on Employer changes to the place, time, and distributors of paychecks of February 5, 1998. The Regional Director held that it was irrelevant that the changes were undertaken for the convenience of the voters. I do not agree.

Under *Kalin*, a change in the paycheck process, related to the election and implemented in the period beginning 24 hours before the election, is per se objectionable. Such matters as motive, justification, and circumstances are irrelevant. I disagree with *Kalin*. I adopt the dissent therein and its rationale. I need only add a few further thoughts.

The pre-Kalin rule (looking at all of the facts and circumstances) is particularly appropriate here. In the in-

stant case, the motive, justification, and circumstances of the change make it clear that the Employer was simply trying to enhance voter turnout. Thus, the application of the per se test yields a particularly anomalous result herein. A cherished goal of industrial democracy, viz. maximum employee participation in the election, becomes a victim of the *Kalin* per se rule. The Employer changed the paycheck process in order to enhance the prospects of voter participation, and that change is now condemned as objectionable.<sup>2</sup>

Finally, I recognize that, in a "UD" election, enhanced voter turnout can be said to favor the party who seeks deauthorization. This is because deauthorization requires the affirmative vote of a majority of all unit employees. However, this principle is simply the embodiment of the relevant Section 8(a)(3) proviso. It does not change the more fundamental goal of having maximum voter turnout in *all* elections. Consistent with this goal, the Employer had the same paycheck arrangement in the "RC" election in 1996.

In sum, I disagree with *Kalin*, and I find that its application to this case is especially pernicious.

<sup>&</sup>lt;sup>1</sup> No exceptions were filed to the Regional Director's recommendation to conduct a hearing on these objections.

<sup>&</sup>lt;sup>2</sup> There is neither evidence nor claim that the changes were accompanied by unlawful threats, inducements, or even campaign rhetoric.